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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ANTHONY PARGA,

Defendant and Appellant.

G050971

(Super. Ct. No. 10NF0673)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed as modified.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Scott C. Taylor, Assistant Attorney General, Kristen K. Chenelia and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted David Anthony Parga of second degree murder (Pen. Code, §§ 187, 189; all further statutory references are to the Penal Code), and found true allegations Parga committed murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and personally discharged a firearm causing death (§ 12022.53, subd. (d)). The jury found not true a gang-murder special-circumstance allegation (§ 190.2, subd. (a)(22)), and acquitted Parga of dissuading a witness (§ 136.1, subd. (a)(2)).

The court sentenced Parga to an indeterminate term of 15 years to life for murder, plus 25 years to life for discharging a firearm causing death, and a determinate 10-year term for the gang enhancement.

The parties agree the court should have imposed the 15-year minimum parole period prescribed under section 186.22, subdivision (b)(5) instead of the 10-year determinate term (§ 186.22, subd. (b)(1)(C)) for the gang enhancement, and we modify the judgment, accordingly.

However, we find no merit in Parga's argument the court improperly discharged a juror during trial, and we reject his challenge to the sufficiency of the evidence to prove the gang enhancement. Thus, as modified, the judgment is affirmed.

FACTS

The Crime

On Saturday night, October 28, 2006, Julian Rosales, an associate of the Westside La Habra criminal street gang, threw a backyard Halloween party. A flyer announcing the party had been distributed to Westside La Habra gang members, associates, and friends.

Around 11:00 p.m., a group of people with no gang affiliation, including Rachel Bruner, Richard Hurtado, and Roman Rodriguez, walked into Rosales's backyard. They saw between 40 to 50 "gangsters" dressed in costumes and enjoying music, pole dancing, and alcohol.

About 40 minutes later, Bruner got into a fight with some girls, and her group decided to leave. When they tried to walk out of the backyard, several unidentified males yelled at them and tried to block their path.

Once on the street, Bruner and her friends met Leland Washington. Then, everyone decided to drive to a nearby gas station and liquor store. They soon decided to return to the party, however, because Bruner discovered her cell phone was missing.

Hurtado and Rodriguez were tasked with retrieving the cell phone while Bruner waited in her car. As Bruner waited, Rosales walked into the street, stood in front of her car, and yelled at her to leave. Washington appeared and intervened. He talked to Rosales, and after this brief verbal exchange, Rosales walked toward his backyard while Washington walked toward his car.

Hurtado and Rodriguez did not find Bruner's cell phone, and they decided to leave the party with Washington and another friend. As the four friends were getting into their car, someone riding a motorcycle, or motorized bicycle, and wearing a hood, beanie, or helmet, shot Washington four times with a .22-caliber long barreled handgun.

A couple of guys standing at Rosales's front door yelled at Washington's friends to "get out of here" because they wanted no "problems at this party." His friends drove Washington to a police station, and the police took Washington to a hospital, but Washington died from multiple gunshot wounds.

Before he died, Washington told a witness the shooter wore a motorcycle outfit and helmet, and multiple witnesses reported seeing someone on a motorcycle leaving the scene shortly after the shooting.

Police investigators found expended .22-caliber shell casings at the scene of the shooting, and four bullet fragments consistent with .22-caliber bullets were recovered from Washington's pelvis, buttock, and left elbow.

Although the police conducted numerous interviews with potential witnesses, including Westside La Habra gang members, the case went cold.

In August 2010, Hosbaldo Fernandez, a Westside La Habra gang member, was in jail with pending criminal charges. He contacted the La Habra Police Department and said he had information about the Washington murder. With the advice of counsel, and in exchange for consideration in his pending criminal case, Fernandez told police he attended Rosales's 2006 Halloween party, and he saw Parga shoot Washington.

Fernandez explained he was standing in the street talking to a girl when he heard a gunshot. He looked to his left and saw Parga, dressed in his motorcycle helmet and leathers, take aim at something and fire multiple shots. He also said Parga had shown him a .22-caliber long-barreled handgun the week before the shooting. He believed Parga would not hesitate to use his gun, and he knew Parga committed crimes for Westside La Habra.

The day after Washington's murder, Parga drove his motorcycle to Fernandez's home for a talk. In a threatening manner, Parga told Fernandez, "keep my name out of your mouth and we'll be cool." Fernandez said he did not tell police what he had seen in 2006 because he was "afraid of that guy."

In 2011, Christina Ortega, the girlfriend of Westside La Habra gang member, Jesse Padilla, found herself in custody with pending charges. She contacted the La Habra Police Department, and told them she had information about the Washington murder she wanted to exchange for consideration in her pending case.

Ortega told police Parga had come to Padilla's house after the party. He was injured and there was "blood everywhere." Parga told Ortega and Padilla that he shot someone at the party, and he shot his own foot putting the gun back in his pants pocket. Ortega admitted she disposed of Parga's clothes a day or two after the murder. She also said Parga had been taking pills and was acting "way off" for the two weeks before the shooting.

In 2012, Daniel Aguirre, another Westside La Habra gang member, was in custody with pending charges when he contacted the La Habra Police Department with information about the Washington murder.

Aguirre told police Parga wore his motorcycle helmet to the party, “as if it was his costume,” and that Parga brought his gun. Aguirre said he asked Parga about the shooting. Reportedly, Parga told Aguirre that he had been very high on methamphetamine and “that dude got crazy and that’s it.” Aguirre took video of the party. He told police that Parga complained because Aguirre had ruined his alibi defense.

In a 2013 interview, Rosales told police Parga shot Washington and wore a motorcycle helmet.

Trial

Fernandez, Ortega, Aguirre and Rosales’s trial testimony substantially conformed to their pretrial statements. However, Fernandez testified Parga was not wearing a helmet when he shot Washington.

Padilla testified Parga showed up at his house after the shooting, and he asked for a change of clothes. While Parga changed clothes, Padilla noticed he had been injured, and there was a hole in Parga’s pants and one shoe. Padilla also said Parga admitted shooting someone, and that he shot himself in the process.

The prosecution introduced evidence that three days after the murder, Parga crashed his vehicle after a high-speed police pursuit. As he was being treated at the hospital, a police officer saw what appeared to be a gunshot wound to Parga’s right foot.

Forensic testing could not eliminate Parga as a contributor to DNA material found on one of the shell fragments found at the murder scene.

After Parga's arrest, he and Padilla were incarcerated in the same facility. One day, Parga and Padilla found themselves riding different directions on the same escalator. Without warning, Parga leaped over the escalator railing and attacked Padilla.¹

Gang Expert

The prosecution's gang expert, Michael Costanzo, described Westside La Habra as a typical, turf-based, Hispanic street gang. The gang formed in the 1970's when two families had a violent feud and split the city. The Adame family claimed the east side of La Habra while the Gomez family claimed the west. Westside La Habra is a subset of the Gomez family gang.

Common signs, symbols, and tattoos associated with Westside La Habra are the letters "W," "S," and "WSLH," and a hand sign made by crossing the middle two fingers and tucking the thumb to make a "W."

Costanzo said Westside La Habra's primary activities included narcotic sales, felony gun possession, felony assault, attempted murder, murder, unlawful vehicle taking, and witness intimidation. He testified about two predicate offenses committed by Westside La Habra gang members in 2004 and 2005.

In 2006, Westside La Habra had around 50 active members, including Parga, and 30 to 40 associates. The gang no longer claimed a particular neighborhood as their turf. Instead, they tended to claim whatever house was available at the time, regardless of location.

Costanzo testified traditional Hispanic gangs are motivated by the desire to be "known as the most – as the craziest gangs out on the streets. They want to be violent. They want to be known for being dangerous." The gang benefits because "people are afraid to report crimes that [the gang] commit[s]. If [the gang is] perceived as a crazy

¹ The court instructed the jury to consider this testimony for the limited purpose of identifying consciousness of guilt.

group of individuals and a crazy group with tons of people, people don't want to report crimes against them. They don't want to become a victim of the next gang crime where another member might assault them for reporting something."

According to Costanzo, individual gang members also earn respect by committing violent acts: "The more violent you are, the more respect you have." Moreover, "with each violent act that an individual gang member commits, the respect or fear of that entire gang is bolstered. . . . So individual members might commit a violent act and it's not necessarily just the benefit of that individual gang member, but the whole gang itself is benefitted, and their respect is bolstered within the community."

Costanzo also testified gang members must put in work for the gang, which means engaging in any activity beneficial to the gang, e.g., committing crimes, writing graffiti, or acting as a look out or back up. Putting in work for the gang establishes the member's worth and respect. And, there is a strict code against cooperating with law enforcement, or testifying against fellow gang members. Violations of this code can lead to beatings, shootings, and murder.

In response to a hypothetical question, Costanzo testified the murder of a nongang member and uninvited guest who returned to a gang party after being asked to leave would benefit the gang by increasing respect and fear, and by promoting the gang's future criminal activities.

Based on his knowledge of gang behavior and culture, Costanzo said violent acts promote the gang because people become intimidated and fearful of cooperating with authorities. In this case, one of Costanzo's own informants refused to testify in a case involving Westside La Habra gang members because of the Washington homicide.

Defense

Parga admitted driving his motorcycle to the party, and bringing his .22-caliber long barreled handgun. During the party, he saw a group of people move from

Rosales's backyard to the front, and then surround a car parked in the street. As Parga followed the group, someone asked him for his gun and said there was going to be trouble.

When Parga reached into his pocket for the gun, it accidentally discharged and shot him in the foot. Parga said he stood stunned for a moment while the other person took the gun from his hands and then fired several shots. Parga quickly left the party and went to Padilla's home to take care of his injured foot.

Parga denied shooting Washington, but he could not identify the shooter. He never found his gun, and he denied taking credit for Washington's murder, or instructing anyone to keep quiet.

One of Rosales's neighbors testified she saw a man with a medium build wearing a hoodie exit the back of a light-colored car right before she heard what sounded like fireworks. After the noise stopped, the man got back into the car, and the car sped away. And, Joshua Vargas testified Parga did not attend the party, and no one wore a motorcycle helmet.

DISCUSSION

1. Discharge of Juror

a. Background

The Monday after a week of testimony from current and former Westside La Habra gang members, and Costanzo's expert testimony about criminal street gangs, two jurors contacted the court with personal concerns.

That morning Juror No. 1 gave the court clerk a note from her doctor that recommended she be excused from further participation in the trial for "medical health reasons." Under questioning by the court, Juror No. 1 said she had been having nightmares, and she felt anxious and paranoid. The court made arrangements for Juror No. 1 to attend a doctor's appointment during court time, and suggested they reevaluate the situation after the appointment. After Juror No. 1 left chambers, the court observed,

“I’m satisfied to keep her. At this point she’s willing to do that.” The attorneys agreed, and the juror continued her service.

Juror No. 2 had called the court clerk from the parking lot. She told the clerk she was afraid to come into the courtroom, and she had suffered a severe panic attack over the weekend.

When questioned, Juror No. 2 said she heard a woman from “the defendant’s side of the courtroom” say, “Oh, that was my daughter’s teacher,” on the first day of trial. Juror No. 2 explained that she had been a teacher at La Habra High School, although she worked at Fullerton High School at the time of trial. Juror No. 2 reported feeling alarmed because someone recognized her, but she did not mention the comment to the court because she did not recognize anyone in the audience.

After the extensive testimony about criminal street gangs, Juror No. 2 said she began to wonder, ““what if someone is upset with the verdict?’ You’re not going to blame your family or your loved one or a friend, because people don’t do that. They have to choose someone else to blame. If they blame the court or the jury, it’s usually not a big deal, but someone knows who I am. They know where to find me.”

The court explained jurors tend to experience a significant amount of stress in difficult cases, and then inquired, “[d]o you feel you can continue on with this?” Juror No. 2 expressed relief at confiding to the court, and said, “I don’t know. I would like to see it through.”

The prosecutor asked if Juror No. 2 would compromise her standards due to fear for her safety. Juror No. 2 said, “No. And I think that’s what gives me a little anxiety.” Defense counsel reminded Juror No. 2 her identifying information had been ordered to be kept under seal, but Juror No. 2 retorted, “I know that’s sealed, but if they know where they work. We had a teacher a few years ago, some students drove by him and shot at his windows. If they want to find you, your students can.”

The court then asked, “What would you like to do?” Juror No. 2 responded, “I’m typically a very logical person, and I usually set emotion aside, so I was shocked by my response to this. I want to say that I’ll be able to do that, compartmentalize and focus on the case itself. I’m shocked at how emotional I got this weekend, even right now.” As Juror No. 2 became more emotional, the court asked her to wait in the courtroom.

Once Juror No. 2 left chambers, the court stated, “My thought is to let this juror go.” The court continued, “It’s like she feels a responsibility to do this. At the same time, I don’t know if – you can’t see her as she’s talking to me, and as she’s crying, from her neck down to where her blouse is, her chest, she is breaking out in a complete rash. Entirely red.” The court also described Juror No. 2’s emotional state by saying, “[s]he is breaking down in here. She can hardly compose herself.” And, the court expressed “very serious concerns about the stability of this particular individual.”

There was also Juror No. 2’s safety to consider. As the court explained, “in a gang case there’s no question that we talk about retribution and retaliation and people get scared.” In this case, the court found there was “a direct statement from this particular juror that somebody recognized her and recognized that she was a teacher at a school in La Habra.” The court expressed “a very legitimate concern for her safety.”

The prosecutor agreed with the court’s good cause determination, but defense counsel objected, pointing out that Juror No. 2 had not “explicitly requested to be excused.” But, as the court observed, every time Juror No. 2 had been asked what she wanted to do, “she started again, crying, started freaking out, breaking out in the rash.” The court discharged Juror No. 2 for cause and replaced her with an alternate.

b. Legal Principles

Section 1089 authorizes the substitution of an alternate juror before or after final submission of the case upon a showing of good cause. (*People v. Cleveland* (2001) 25 Cal.4th 466, 475.) The court’s good cause determination is subject to review for

abuse of discretion, but the inability of the juror to perform “his or her duty ‘must appear in the record as a demonstrable reality.’ [Citations.]” (*People v. Armstrong* (2016) 1 Cal.5th 432, 450.) While this court must “be confident that the trial court’s conclusion is manifestly supported by evidence on which the court actually relied[,]” we consider both the evidence and the court’s stated justification. (*Id.* at p. 451.)

c. Analysis

In this case, Juror No. 2 had been made uncomfortable when she realized someone she associated with Parga, an admitted gang member, recognized her. After hearing testimony from gangsters and the gang expert, her discomfort turned to fear and panic. Juror No. 2 did not explicitly ask to be removed, but according to the court’s description of her physical and emotional state, an explicit request was not necessary. Apparently, the mere thought of continuing jury service made Juror No. 2 cry, freak out, and break out in a rash. In our view, Juror No. 2’s inability to continue as a juror was a demonstrable reality. (See *People v. Lucas* (1995) 12 Cal.4th 415, 489 [importance of juror’s demeanor in court’s decision to discharge]; see also *People v. Tate* (2010) 49 Cal.4th 635, 666 [trial court has advantage of observing the juror’s demeanor when assessing his or her true state of mind].)

Relying on *U.S. v. Araujo* (7th Cir. 1995) 62 F.3d 930, and *U.S. v. Patterson* (D.C. Cir. 1994) 26 F.3d 1127, Parga argues the court abused its discretion because the record leaves open the question of whether Juror No. 2 could have resumed her service after a brief delay.

But, these cases involved ill jurors who may have been able to recover and return to service. (*Araujo, supra*, 62 F.3d at p. 934; *Patterson, supra*, 26 F.3d at p. 1128.) Here, the factors leading to Juror No. 2’s emotional meltdown could not be remedied by a break in court proceedings. Her fear of gang retaliation, and the physical manifestations of that fear, would have persisted throughout trial and carried into jury deliberation. Thus, in contrast to the cases on which defendant relies, this record supports the court’s

decision to immediately discharge Juror No. 2 for her emotional and physical well-being, and to ensure a fair trial. The court did not abuse its discretion.

2. Sufficiency of the Evidence-Gang Enhancement

Parga acknowledges substantial evidence proves Westside La Habra is a criminal street gang, and he was an active gang member. Nevertheless, he asserts not every crime committed by a gang member is gang related, and that shooting Washington had nothing to do with Westside La Habra.

In essence, Parga argues he shot Washington for no particular reason when he was high on methamphetamine. To urge his point, Parga emphasizes the dearth of evidence he made gang hand signs, shouted gang epithets, wore gang clothing, or shot Washington during a gang confrontation, and he minimizes the weight of any contrary evidence.

But, “the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant’s burden to affirmatively demonstrate error. [Citation.]” (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) Merely arguing about evidence that is not in the record fails to meet that burden. (*Id.* at pp. 1573-1574.) Here, substantial evidence supports the jury’s finding.

The gang enhancement requires evidence the defendant committed the underlying offense for the benefit of, at the direction of, or in association with a criminal street gang, and he or she acted with the specific intent to promote, further, or assist other criminal conduct by gang members. (*People v. Albillar* (2010) 51 Cal.4th 47, 59.)

Parga shot Washington when Washington returned with Bruner to the Westside La Habra Halloween party. Bruner and her friends had earlier exchanged words with several Westside La Habra gang members, and promptly left the party. As uninvited guests at a gang party, she and her friends were threatened. When Bruner returned for her phone, Rosales came out into the street to yell at her and tell her to leave. Washington intervened, and within minutes, Parga appeared and shot him four times.

Costanzo testified Westside La Habra's primary activities include felony gun possession, felony assault, attempted murder, and murder. He explained how the return of uninvited guests to a gang party could be sufficient to initiate a lethal response, and how the commission of violent crimes benefits the gang by increasing respect and fear, and promoting future criminal activities. In fact, Costanzo testified the Washington murder caused one informant to rethink his or her cooperation with police on a case involving Westside La Habra gang members.

In light of all these facts, the location of the murder, Bruner's prior scuffle with Westside La Habra gang members at the party, Washington's association with Bruner and her friends, and Rosales's exchange with Washington when Bruner returned, a reasonable juror could have rejected Parga's defense and concluded he murdered Washington for the benefit of Westside La Habra and with the specific intent to promote, further, or assist other criminal conduct by gang members. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130, fn. 5.)

Parga asserts the jury's finding he did not commit premeditated murder mandates a different result. But, intent and motive are not interchangeable. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 503-504.) The jury's determination Parga did not premeditate Washington's murder has no bearing on whether he killed Washington with the specific intent to promote, further, or assist criminal conduct by other gang members.

DISPOSITION

We strike the 10-year determinate term for the gang enhancement and impose the 15-year minimum parole period (§ 186.22, subd. (b)(5)). As modified, the judgment is affirmed. (§ 1260.)

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.